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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

HUGH B. GALLAGHER , III,
AND JOANNE GALLAGHER, GUARDIANS OF
THE ESTATE OF HUGH B. GALLAGHER, IV,

Respondents

v.

TEMPLE UNIVERSITY HOSPITAL,

Petitioner

No. 70 EAL 2007

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 28th day of June 2007, the Petition for Allowance of Appeal is DENIED. The Application for Permission to File Post-Submission Communication is also DENIED.

TRUE COPY FROM RECORD
Attest: June 28, 2007
/s/
John W. Person, Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

NON-PRECEDENTIAL DECISION
SEE SUPERIOR COURT I.O.P. 65.37

IN THE SUPERIOR COURT OF PENNSYLVANIA

HUGH B. GALLAGHER , III,
AND JOANNE GALLAGHER, GUARDIANS OF
THE ESTATE OF HUGH B. GALLAGHER, IV,

Appellees

v.

TEMPLE UNIVERSITY HOSPITAL,

Appellant

No. 574 EDA 2004

Appeal from the Judgment entered February 12, 2004 in the Court of Common Pleas of Philadelphia County, Civil Division, at No. 002643, April Term 2001.

BEFORE: ORIE MELVIN, PANELLA and MONTEMURO*, JJ.

MEMORANDUM: **FILED JANUARY 10, 2007**

This matter is back before this Court on remand from our Supreme Court with direction that we review the record and reconsider whether Appellant, Temple University Hospital, has demonstrated that it suffered prejudice as a result of the trial court's error in allowing Appellees to amend their complaint to raise a claim for punitive damages. After further review, the record reflects that Appellant has failed to demonstrate that it suffered any prejudice. Accordingly, we affirm the judgment on the verdict for medical malpractice and compensatory damages.

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* Justice Montemuro did not participate in the reconsideration of this matter.

The underlying factual and procedural background was summarized in our prior memorandum, and will not be restated.

Our standard of review is well settled:

> This Court will not reverse a trial court's decision regarding the grant or refusal of a new trial absent an abuse of discretion or an error of law .... Further, if the basis of the request for a new trial is the trial court's rulings on evidence, then such rulings must be shown to have been not only erroneous but also harmful to the complaining party. Evidentiary rulings which did not affect the verdict will not provide a basis for disturbing the jury's judgment.
>
> *Yacoub v. Lehigh Valley Med. Assocs., P.C.*, 2002 PA Super 251, 805 A.2d 579, 586 (Pa. Super. 2002) (*en banc*).

Our Supreme Court has made clear that our review should involve a two-step process:

> Each review of a challenge to a new trial order must begin with an analysis of the underlying conduct or omission by the trial court that formed the basis for the motion. There is a two-step process that a trial court must follow when responding to a request for new trial ... First, the trial court must decide whether one or more mistakes occurred at trial. These mistakes might involve factual, legal, or discretionary matters. Second, if the trial court concludes that a mistake (or mistakes) occurred, it must determine whether the mistake was a sufficient basis for granting

> a new trial ... The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake.
>
> *Harman v. Borah*, 562 Pa. 455, 756 A.2d 1116, 1122 (Pa. 2000). Thus, we consider whether the trial court made an erroneous ruling and, if so, whether the mistake constituted harmless error or whether Appellants suffered any prejudice. *Yacoub; Harman.* We will not reverse an order denying a new trial unless the trial court committed an error of law that controlled the outcome of the case.
>
> *Coward v. Owens Corning Fiberglass Corp.*, 1999 PA Super 82, 729 A.2d 614, 624 (Pa. Super. 1999).

Antoniotti v. Eckels, 840 A.2d 1013, 1015-1016 (Pa. Super. 2003).

We previously determined that the trial court erred in allowing Appellees to amend their complaint to include a claim for punitive damages but found the error was harmless due to waiver because the evidence regarding a cover-up was admitted without objection from Appellant. Our Supreme Court found this reason insufficient and vacated our order affirming the judgment as to compensatory damages and remanded with instructions. *Gallagher v. Temple Univ. Hosp.*, __ Pa. __, 901 A.2d 981 (2006). Thus, as per the Supreme Court remand order, we are left to reconsider whether Appellant has

demonstrated that it suffered prejudice as a result of the trial court's error.[1]

After further review, the record reflects that Appellant has failed to demonstrate that it suffered any prejudice by the amendment allowing the raising of a claim for punitive damages. Appellant argues in its supplemental brief on remand that it was prejudiced by inference from Appellees' arguments for a punitive sanction. They specifically contend that Appellees' counsel "intertwined malpractice and punitive liability, arguing that the alleged 'cover-up' proved Temple Hospital's liability for medical malpractice, and further exhorted the jury to punish Temple for the plaintiff ..." Appellant's Supplemental Brief on Remand at 13.

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[1] The specific directive from the order reads as follows:

> This Court concludes that the reason the Superior Court gave for its determination that Petitioner sustained no prejudice as a result of the trial court's error is insufficient to support that determination. Therefore, it is hereby ordered that this case be REMANDED to the Superior Court, with instructions to review the record and reconsider whether Petitioner has demonstrated that it has suffered prejudice from the trial court's error.
>
> If the Superior Court concludes that, given the record before it, it is not in a position to decide the matter, and that Petitioner is entitled to a new trial, the Superior Court shall remand the case to the trial court to conduct a new trial. Jurisdiction relinquished. *See Harman v. Borah,* 562 Pa. 455, 756 A.2d 1116 (Pa. 2000); *Morrison v. Commonwealth, Dep't of Public Welfare,* 538 Pa. 122, 646 A.2d 565 (Pa. 1994).

Id. at __, 901 A.2d at 982.

Our review finds no support in the record for such a claim. In fact, Appellees' counsel never mentioned the words punish, punishment, or punitive damages during the medical malpractice phase of the case let alone urged the jury to find negligence liability based upon punitive concepts. Rather, Appellees' counsel took great care to properly outline only the elements applicable to compensatory damages for Hugh Gallagher's brain injury. N.T. Trial, 10/23/03, at 57-72. Likewise, the trial court only instructed on compensatory damages and never charged the jury on punitive damages during the compensatory phase of the trial. N.T. Trial, 10/24/03, at 13-16. Moreover, the trial court specifically instructed the jury that they were not there to punish anyone. *Id.* at 9, 24.

Furthermore, all of the instructions and arguments made it clear that the jury was only to consider whether the so-called "cover-up" conduct that occurred after the brain injury was willful or wanton or indifferent to the rights of Mr. Gallagher in pursuing his claim. *See id.;* at 41 (the trial court reiterated that "when I indicated to you on this verdict sheet was the conduct of [Appellant] willful or wanton or with reckless indifference to the rights of Hugh Gallagher, IV, that pertains to anything that may have occurred after the injury was sustained. Not before, after. Okay."). Instantly, the trial court did not give the general instructions applicable to punitive damages,[2] and

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[2] *See, e.g.*, PASSCJI 14.00, which provides:

> 14.00 (Civ) PUNITIVE DAMAGES - GENERAL INSTRUCTIONS
>
> [If you find that the defendant's conduct was a substantial factor in bringing about the harm the plaintiff is alleged to have suffered and] If you find that the conduct of the defendant was outrageous, you may award punitive damages, as well as any compensatory damages, in order to

the jury was not asked to make an award of damages to punish Appellant for its post-jury conduct until after the jury had determined that Mr. Gallagher was entitled to compensatory damages for Appellant's negligence in response to his oxygen deprivation, which resulted in his brain injury. Question No. 4 on the Verdict Sheet[3] merely asked for an answer to a threshold question necessary for determining whether a further assessment of punitive damages would be proper. *See SHV Coal, Inc. v. Continental Grain Co.*, 526 Pa. 489, 493, 587 A.2d 702, 704 (1991) (stating "Assessment of punitive damages are proper when a person's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct, and are awarded to punish that person for such conduct."). Appellees' counsel did not request, and the trial court did not instruct, the jury to make any award of punitive damages or even explain the function of such damages or the factors that go into making a punitive award until after a verdict in the negligence phase was rendered. Simply stated, how could the jury have included punitive damages in the compensatory verdict on the malpractice claim when they were never instructed on the purpose or function of punitive damages and were never told they could award such damages? Therefore, we cannot presume that the jury understood the purpose for Question No. 4 in the vacuum in which it was presented.

> punish the defendant for his conduct and to deter the defendant and others from the commission of like acts.
>
> A person's conduct is outrageous when he acts with a bad motive or when he acts with reckless indifference to the interests of others.

[3] Specifically, the question presented read as follows: "Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of Hugh Gallagher IV?"

We further find Appellant's reliance on *Francis v. Coughlin,* 755 F. Supp. 618 (S.D.N.Y. 1990) and the cited law review articles, noting the general proposition that there is a greater likelihood for prejudice when compensatory liability and punitive damages are tried at the same time, are misplaced. The presentation of the case and instructions given by the trial court in *Francis* were substantially different from the manner in which the instant trial was conducted. First, unlike in *Francis,* compensatory liability and punitive damages were not tried at the same time in this case. In *Francis,* the words punitive damages actually appeared on the verdict slip, and the jury was instructed to determine whether it believed both compensatory damages and punitive damages were appropriate. Additionally, unlike here, the jury sent a note to the trial court during deliberations clearly suggestive of the fact that the jury was considering punitive damages in the compensatory phase. Further, the jury's first verdict was not listed as a dollar amount but in terms of one year's gross salary of each of the defendants, again clearly indicative of inclusion of a punitive component. *Id.* Finally, after the jury was informed that their first verdict was not acceptable, they deliberated further and returned a compensatory verdict which was grossly disproportionate to the evidence on compensatory damages, again suggesting a punitive component to their verdict. *Id.* at 620-21. Given the clear confusion as to the law on damages the District Court concluded that a new trial on damages was necessary.

Instantly, there is no record evidence of jury confusion. The verdict sheet here was unambiguous and required the jury to first find that Appellant was negligent and that its negligence was a substantial factor in bringing about Mr. Gallagher's brain injury and then make an award for compensatory damages for that brain injury. Only after those determinations were answered affirmatively was the jury asked to make the threshold determination of whether or not Appellant's conduct

following the injury was willful or wanton or with reckless indifference to the rights of Mr. Gallagher in pursing his claim. Significantly, the jury was never told that this question pertained to a punitive damages claim nor were they instructed to consider whether such damages were appropriate. While the record in *Francis* was replete with positive evidence that the jury was considering punitive damages in the compensatory phase of the case, there is no such evidence of confusion here, and the verdict was actually less than the high end of the economic damages claimed by the Appellees. Even in the absence of a punitive damages cause of action, the conduct of the hospital's personnel in altering and destroying Mr. Gallagher's hospital records and the difficulty in obtaining the original flow sheet was properly admitted to explain why Appellees could not show an exact time line surrounding the oxygen deprivation suffered by Mr. Gallagher and formed the basis for an adverse inference charge. While such evidence of the alleged post-injury cover-up could not itself legally support a claim for punitive damages, those events were clearly relevant and, therefore, admissible to show negligence and causation. The only change in the presentation of the case occasioned by allowance of the amendment to the complaint to present a claim for punitive damages was the inclusion of Question No. 4 on the verdict sheet. However, as previously noted, the jury was never told that the purpose of this question was to serve as a predicate determination for a potential punitive award. The arguments advanced by Appellees' counsel remained the same and did not call for punitive damages for post-injury conduct as suggested by Appellant's contentions in its brief. Given the trial court's careful bifurcation of the relevant questions concerning compensatory liability and punitive liability, we are convinced that the error in allowing a punitive damages claim to go forward could not have contributed to the compensatory verdict. Consequently, Appellant has failed to show prejudice, and the trial court did not

abuse its discretion in denying Appellant's motion for new trial.

Judgment on the verdict for medical malpractice and compensatory damages affirmed.

Judgment Entered.

/s/
Prothonotary

Date: January 10, 2007

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

HUGH B. GALLAGHER , III,
AND JOANNE GALLAGHER, GUARDIANS OF
THE ESTATE OF HUGH B. GALLAGHER, IV,

Respondents

v.

TEMPLE UNIVERSITY HOSPITAL,

Petitioner

No. 608 EAL 2005

Petition for Allowance of Appeal from the Order of the Superior Court at 574 EDA 2004 dated September 15, 2005 affirming in part; reversing in part the order of the Court of Common Pleas Philadelphia County at 002643 dated February 12, 2004

ORDER

PER CURIAM

AND NOW, this 20th day of June, 2006, it is hereby ordered that the Petition for Allowance of Appeal is GRANTED. It is further hereby ordered that the portion of the Order of the Superior Court affirming the judgment on the verdict with respect to liability for medical malpractice and compensatory damages is VACATED.

This Court concludes that the reason the Superior Court gave for its determination that Petitioner sustained no prejudice as a result of the trial court's error is insufficient to support that determination. Therefore, it is hereby ordered that this case be REMANDED to the Superior Court, with instructions to review the record and reconsider whether Petitioner has demonstrated that it has suffered prejudice from the trial court's error.

If the Superior Court concludes that, given the record before it, it is not in a position to decide the matter, and

that Petitioner is entitled to a new trial, the Superior Court shall remand the case to the trial court to conduct a new trial. Jurisdiction relinquished. *See Harman v. Borah*, 756 A.2d 1116 (Pa. 2000); *Morrison v. Commonwealth, Dep't of Public Welfare*, 646 A.2d 565 (Pa. 1994).

TRUE COPY FROM RECORD
Attest: June 22, 2006
/s/
John W. Person, Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

NON-PRECEDENTIAL DECISION
SEE SUPERIOR COURT I.O.P. 65.37

IN THE SUPERIOR COURT OF PENNSYLVANIA

HUGH B. GALLAGHER , III,
AND JOANNE GALLAGHER, GUARDIANS OF
THE ESTATE OF HUGH B. GALLAGHER, IV,

Appellees

v.

TEMPLE UNIVERSITY HOSPITAL,

Appellant

No. 574 EDA 2004

Appeal from the Judgment entered February 12, 2004 in the Court of Common Pleas of Philadelphia County, Civil Division, at No. 002643, April Term 2001.

BEFORE: ORIE MELVIN, PANELLA and MONTEMURO*, JJ.

MEMORANDUM: **FILED SEPTEMBER 15, 2005**

Appellant, Temple University Hospital, appeals from the judgment entered in favor of the Appellees, Hugh B. Gallagher, III and Joanne Gallagher, guardians of the Estate of Hugh B. Gallagher, IV, in this medical malpractice case. Appellant raises various challenges to the jury's award of punitive damages. After review, we affirm in part and reverse in part.

The trial court aptly summarized the facts and procedural background of this matter as follows.

> In May, 2000, Hugh B. Gallagher, IV, then age 19 (hereinafter, Gallagher) was admitted to the

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* Retired Justice assigned to the Superior Court.

burn intensive care unit (BICU) at Temple University Hospital, after suffering severe, self-inflicted burns in an unsuccessful suicide attempt. The BICU contained seven beds, and on the evening of June 7, 2000, three nurses were on duty in the unit. Nurse Janet Lawson was assigned to be Gallagher's nurse, and Gallagher was the only patient for whom she was responsible that evening.

Because Gallagher was having trouble breathing independently, he had a tracheotomy in place, which placed him at risk that a mucous or blood clot would block his airway. This required that he be suctioned at least once an hour, and was the most important reason that he had to be monitored.

At approximately 11:40 PM, Gallagher's airway became blocked, and he was unable to breathe. No one responded to his alarm for a period of between four and ten minutes, and by the time that Gallagher's condition was discovered, he was pasty white, had no heart rate, and was not breathing. Though he was resuscitated, there is no dispute that Gallagher suffered severe brain injury from loss of oxygen caused by the delay in responding to his alarm.

As a result, Gallagher (who had been a student at Penn at the time of this hospitalization) will never again live independently. He will likely never be able to hold a job, and will require the care of others for the rest of his life. He has difficulty walking and maintaining his equilibrium.

Gallagher's parents, his guardians, brought suit against Temple University Hospital for negligence. At trial, [the trial court] allowed the [Appellees] to amend their Complaint to

> add a claim for punitive damages [], and after an eight-day trial (from which the punitive damages claim was bifurcated), the jury returned a compensatory verdict of twenty million dollars.
>
> The parties then presented additional evidence on the issue of the [Hospital's] net worth, after which the jury was charged on punitive damages. The jury again retired to deliberate, after which it returned an additional award of $15,000.00 in punitive damages.

Trial Court Opinion, 8/23/04, (unnumbered) at 1-2. Subsequently, post-trial motions were denied, and delay damages were awarded. This appeal followed the entry of judgment.

On appeal, Appellant presents the following questions for our review:

> A. Is Temple Hospital entitled to judgment in its favor on a punitive damages claim that is constitutionally infirm under federal due process principles, legally invalid under Pennsylvania law, and factually insufficient as a matter of law?
>
> B. Is Temple Hospital entitled to a new trial where the jury's malpractice liability and damages verdict was compromised and irreparably tainted by plaintiffs' constitutionally infirm, legally invalid and/or factually insufficient punitive damages claim?
>
> C. Did the trial court commit reversible error by its refusal to charge the jury on the principles of vicarious liability under the MCARE Act that pertain specifically to the award of punitive damages against health care providers?

> D. Is Temple Hospital entitled to a new trial due to the trial court's failure to promptly investigate, and to ameliorate if possible, the issue of jury confusion when it first arose at trial, and, additionally, by the trial court's refusal post-trial to receive or consider permitted juror communications that confirmed the jury had in fact mistakenly but improperly included punitive damages in its malpractice damages award?

Appellant's brief, at 3.

Appellant first argues that it is entitled to a judgment n.o.v. on the punitive damages claim because it is in derogation of both controlling federal constitutional law and Pennsylvania law. Appellant argues that both federal due process and Pennsylvania law require that a claim for punitive damages must be based upon the conduct causing the specific injury for which liability is being asserted and not upon unrelated conduct occurring post-injury.

Initially, we note that

> Our standard of review of an order denying judgment n.o.v. is whether, reading the record in the light most favorable to the verdict winner and granting the benefit of every favorable inference, there is sufficient competent evidence to support the verdict. Any conflict in the evidence must be resolved in favor of the verdict winner. Judgment n.o.v. may be granted only in clear cases where the facts are such that no two reasonable minds could fail to agree that the verdict was improper.

Hart v. O'Malley, 781 A.2d 1211, 1218-1219 (Pa. Super. 2001) (citations omitted). Furthermore,

> [t]he purpose of punitive damages is to punish outrageous and egregious conduct done in a reckless disregard of another's rights; it serves a deterrence as well as a punishment function. Therefore, under the law of this Commonwealth, a court may award punitive damages only if an actor's conduct was malicious, wanton, willful, oppressive, or exhibited a reckless indifference to the rights of others.

Hall v. Jackson, 788 A.2d 390, 403 (Pa. Super. 2001) (quoting *Johnson v. Hyundai Motor America*, 698 A.2d 631, 639 (Pa. Super. 1997) (citations omitted)). "Conversely, punitive damages may not be awarded for misconduct which constitutes ordinary negligence such as inadvertence, mistake and errors of judgment." *Id.* (citing *McDaniel v. Merck, Sharp & Dohme*, 533 A.2d 436, 447 (Pa. Super. 1987) (citation and quotation marks omitted)).

The facts with respect to the punitive damages claim concern the Hospital's conduct in attempting to cover-up the true facts surrounding Mr. Gallagher's oxygen deprivation by altering and withholding medical records for the relevant time period. Specifically, the trial court notes:

> In this case, over a period of approximately two and one-half years, [Appellees'] counsel conducted extensive pre-trial discovery. During that time—and in fact until just days before trial began—[Appellees'] counsel had been falsely advised that he had received copies of all medical records relevant to the case, and that those records had not been altered in any respect.
>
> In fact, the [Hospital] had repeatedly failed to advise [Appellees'] counsel that certain entries on Gallagher's critical care "flowsheet" for the

> evening of June 7, 2000 had been "whited out" and rewritten, that the original flowsheet had been removed from the file and replaced with a copy, and that the original flowsheet was stored in a safe located in the office of the [Hospital's] Risk Manager. The [Hospital] had falsely claimed, in response to numerous discovery requests, that the original flowsheet had been misplaced, and could not be located.
>
> When [Appellees'] counsel learned for the first time—and contrary to earlier representations—that the [Hospital] indeed possessed the original flowsheet, he sought—and received—leave of Court to amend the Complaint to add a claim for punitive damages *stemming from the [Hospital's] apparently-deliberate failure to produce the original record, and the [Hospital's] repeated (and false) representations that it could not be located.*

Trial Court Opinion, 8/23/04, at 4-5 (footnote omitted).

We agree with Appellant's contention that a defendant's acts that are independent from the conduct on which liability is premised may not serve as the basis for punitive damages. Instantly, Appellees concede that they are not claiming punitive damages for the Hospital's negligent monitoring of Mr. Gallagher, which led to his oxygen deprivation and resultant brain damage. Rather, they asserted an independent claim for punitive damages premised upon the allegedly outrageous conduct of altering and withholding the medical records in an attempt to stymie Mr. Gallagher's guardians from successfully obtaining redress for his injury by tampering with the discovery of the facts necessary for prosecution of his medical malpractice lawsuit. While this conduct is relevant to show after the fact awareness of negligence on the hospital's part, it does not, however, relate to the conduct alleged to have been negligent, which actually

caused the injury. While the conduct surrounding the alleged withholding of certain medical records and the whiting out of portions of other records, if true, is undoubtedly reprehensible, none of these facts, however, relate to the malpractice being litigated. Nor do these facts assert a separate cause of action sounding in tort.

Appellees' argument to the contrary that a claim for punitive damages may be made even in the absence of physical injuries misses the point. They fixate on the element of damages without looking at the bigger picture, that being, the predicate upon which the damages are based. "The right to punitive damages is a mere incident to a cause of action, an element which a jury may consider in making its determination and not the subject matter of the action in itself." *Weider v. Hoffman*, 238 F. Supp. 437 (W.D. Pa. 1965). The Restatement of Torts defines damages to mean "a sum of money awarded to a person *injured by the tort of another.*" Restatement (Second) of Torts, § 902 (emphasis added). Thus, without a cause of action there can be no damages of any kind. As both Section 505 of the MCARE Act, 40 P.S. § 1303.505(a), and the cases cited by Appellees, which allow assessment of punitive damages, are dependant upon a valid assertion of a cause of action in tort, Appellees' reliance thereon is misplaced. Accordingly, we find the trial court erred in denying Appellant's motion for judgment n.o.v. on the issue of punitive damages.

Appellant next argues that it is entitled to a new trial on the medical malpractice claim because it was prejudiced by the inclusion of the claim for punitive damages. In reviewing a refusal to grant a new trial, our examination is limited to a determination of whether the trial court committed an error of law that controlled the outcome of the case or committed an abuse of discretion. *Fanning v. Davne*, 795 A.2d 388, 393 (Pa. Super. 2002), *appeal denied*, 573 Pa. 697, 825 A.2d 1261 (2003).

> An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the judgment is the result of partiality, prejudice, bias or ill-will, as shown by the evidence of record, discretion is abused. We emphasize that an abuse of discretion may not be found merely because the appellate court might have reached a different conclusion, but requires a showing of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous.

Fanning at 393 (quoting *Paden v. Baker Concrete Construction Co., Inc.*, 540 Pa. 409, 412, 658 A.2d 341, 343 (1995)).

In this regard, Appellant argues that the jury's award of compensatory damages was tainted by the inclusion of the evidence related to the punitive damages claim. We disagree.

Initially, we note that all the evidence concerning the alleged cover up, which Appellant now complains tainted the jury, was relevant to liability and was admitted without objection by Appellant before the Appellees orally requested an amendment of the complaint to include a claim for punitive damages. Therefore, Appellant's post-verdict argument that this evidence should not have been admitted or was somehow misused has been waived. Moreover, even if not waived, we can discern no taint in the jury's deliberations during the compensatory phase of the case. The trial court was careful to bifurcate the punitive damages claim from the compensatory claim. The jury did not hear any evidence in the compensatory phase that they would not have otherwise heard had there been no punitive damages claim. Furthermore, the amount of the compensatory damages, while significant,

was still seven million dollars less than the asserted economic damages submitted into evidence by the Appellees.

As explained by the trial court:

> [P]unitive damages were not tried together with the compensatory claims. There was no reasonable method by which the fact that white-out had been applied to the flowsheet could have been excluded from the evidence presented in support of the [Appellees'] claims for compensatory damages; the mere admission of this evidence in the compensatory portion of the case does not constitute trial of the punitive damages claim, and indeed, the [Appellant] does not argue otherwise.
>
> Even though the document was ultimately produced, the use of "white-out" (a violation of the hospital's own policy) made it impossible to be certain what the original entries had said. Accordingly, the [trial court] gave the jury an "adverse inference" charge, advising them that they could assume, for the purposes of their deliberations, that the unreadable entries would have contained information unfavorable to the defense.
>
> That being so, the *only* evidence relevant to the punitive damages claim that was *irrelevant* to the compensatory damages claim was evidence of the [Appellant's] net worth, and—in recognition of the fact that wealth evidence can taint a compensatory award—no evidence on that point was given to the jury until after it had returned a verdict on the compensatory claims. In fact, though the [Appellant] contends that the

> punitive damages claim "tainted" the jury's deliberation on compensatory damages, the [Appellant] had not identified a single piece of evidence that it claims should have been excluded from the compensatory damages phase of the case of that basis.
>
> On the initial verdict sheet, the jury was asked only a threshold question pertaining to punitive damages—was the conduct of Temple University Hospital [after the injury had occurred] willful or wanton or the reckless indifference to the rights of Hugh Gallagher—and only after it returned a compensatory verdict and answered this question in the affirmative was evidence presented on the punitive damages claim itself. Had the jury found that the [Appellant] had not been negligent, that such negligence had not been a substantial cause of Gallagher's injuries, or that Gallagher had suffered no compensable damages, this "threshold question" would never have been reached.

Trial Court Opinion, 8/23/04, at 6-7 (footnotes omitted). Thus, we would find the amendment to allow a claim for punitive damages based upon post-injury conduct was harmless. *See Harman v. Borah*, 562 Pa. 455, 756 A.2d 1116 (2000) (restating the general proposition that even where error is committed a new trial is not warranted unless the complaining party demonstrates that they were prejudiced by the error).

In light of our disposition reversing the denial Appellant's request for judgment n.o.v. on punitive damages, there is no need to consider Appellant's arguments regarding the trial court's refusal to instruct on vicarious liability in connection with punitive damages.

Finally, we turn our attention to Appellant's contention that the trial court erred in failing to investigate the possibility of juror confusion after rendering its verdict. Here, Appellant attempts to invoke one of the limited exceptions to the no impeachment rule. Specifically, Appellant argues that the jury proceeded on a mistake of law or fact. We disagree.

After the verdict was announced the jury was polled with unanimous results, and the verdict was recorded. The trial court then advised the jurors that because of their answer to interrogatory number 4 their duties were not completed as they would have to return Monday morning to consider an award of punitive damages. At this point the jury foreperson expressed concern stating "I think the verdict that we came to, because we half on one and half on the other, the question—." N.T., 10/24/03, at 57. Before the juror could complete the statement the court interrupted and explained that a hearing to determine the amount, if any, for punitive damages was still necessary and recessed the jury until Monday. The following colloquy then took place:

> MR. FITZPATRICK [(Appellant's counsel)]: I move for a mistrial. Based on the foreperson's statement, I believe what she was telling the Court was that they had already considered punitive damages in their deliberation. That's why I don't believe that punitive damages are in the case. I argued that all along. Now we've got a jury that clearly from her statement they already put that in a verdict, which they shouldn't have, and now you're going to send them out again to decide that they add more to it. I move for a mistrial.
>
> MR. SPECTER [(Appellee's counsel)]: Judge, that's not a fair inference from the fragment that the juror spoke. As I recall, what she

> said was, she said we were half and half, and I stood up to interpose an objection, because the jurors' deliberations are specifically sacrosanct and what they were discussing at some previous time may not be inquired into.
>
> THE COURT: They can't impeach their own verdict.
>
> MR. SPECTER: Correct. If they determine that no punitive damages are warranted, they will come back and award zero dollars. They have the right.
>
> MR. FITZPATRICK: I still feel that Your Honor instructing they have to come back on damages.
>
> MR. SPECTER: As a matter of fact, the Court must instruct that they are not required to enter an amount of damages. They can decide to award no punitive damages if they think it's appropriate.
>
> THE COURT: Motion for mistrial is denied.

Id. at 58-59.

We reject Appellant's self-serving interpretation that this partial utterance by one juror shows that the jury awarded punitive damages as part of the compensatory award. The juror's statement at best is ambiguous and could have just as easily have been interrupted to indicate that the jury had difficulty in reaching a consensus on liability or the amount of compensatory damages. In any event, the deliberative process is not to be inquired into in the absence of evidence of clear confusion.

Unlike the case of *Francis v. Coughlin*, 755 F. Supp. 618 (S.D.N.Y. 1991), relied upon by Appellant, there simply is no evidence of jury confusion in this case. We note that the verdict slip here was unambiguous and required the jury to find liability and make an award for

compensatory damages before reaching the threshold question pertaining to punitive liability, which simply asked "Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of Hugh Gallagher, IV?" Here, unlike in the *Francis* case, there was no mention of punitive damages during the compensatory phase nor did the jury send the court a question during deliberations that indicated they were considering punitive damages in the compensatory phase. Consequently, the trial court properly determined that a new trial was not warranted.

Moreover, we find Appellant's reliance on *Drum v. Shaull Equipment and Supply Co.*, 787 A.2d 1050 (Pa. Super. 2001), *Pa. Dep't of Transp. v. Nemiroff*, 401 A.2d 10 (Pa. Cmwlth. 1979), and *Leopold v. Davies*, 369 A.2d 868 (Pa. Super. 1977), for the proposition that it is proper for a trial judge to investigate or question the jury verdict where it appears that the jury has proceeded on a mistake of law or fact is misplaced. Those cases hold that new trial is warranted where "a jury is clearly confused, and the trial court cannot rectify the confusion by appropriate instructions." *Drum*, 787 A.2d at 1058 (citing *Nemiroff*, 401 A.2d at 12). They do not stand for the proposition that a judge may properly "investigate" into the jury's deliberative process to determine how they reached their verdict. Here, the verdict announced in court was consistent with the verdict slip, and the individual jurors were polled with unanimous results. Accordingly, we find no error in the trial court's refusal to investigate any alleged confusion.

Appellant's reliance upon *Smith v. Snowden Township*, 348 Pa. 187, 34 A.2d 515 (1943), is likewise unavailing. *Smith* does not stand for the proposition Appellant would have this Court believe. *Smith* is merely reflective of the disfavor the courts of this Commonwealth hold for sealed verdicts. Instantly, we are not dealing with a sealed verdict where jurors are separated and later

return to announce their verdict. As previously addressed there was no separation of the jury prior to the announcement of their verdict, and there was no juror dissent to the verdict upon polling. Thus, no further inquiry by the court was necessary.

Finally, we find that Appellant waived his assertion that the trial court erred in striking the affidavits of counsel who questioned two of the jurors in an *ex parte* meeting after the verdict. As the Appellees point out, during oral arguments on the post-trial motions, their counsel argued that Appellant's counsel acted improperly in obtaining these affidavits, and Appellant's counsel responded by consenting to the striking of the affidavits. Specifically, counsel stated "We don't need to get to the affidavits at all. If you want to remove the affidavits from the brief, it's okay with me because granting the amendment and allowing Interrogatory No. 4 and allowing Mr. Specter to argue what I just read to you, that was fundamental error. We don't need the affidavits about what the jurors said afterwards." N.T. Post-Trial Motions, 1/20/04, at 50. Accordingly, Appellant cannot now be heard to complain.

Even if not waived, the affidavits were properly stricken since they constituted hearsay recollections of what those jurors allegedly told the affiants rather than the sworn statements of the jurors.

Judgment on the verdict with respect to liability for medical malpractice and compensatory damages affirmed. Judgment on the verdict with respect to punitive damages reversed.

Judgment Entered.

/s/
Prothonotary

Date: _____

IN THE COURT of COMMON PLEAS - PHILADELPHIA COUNTY FIRST JUDICIAL DISTRICT of PENNSYLVANIA CIVIL TRIAL DIVISION - LAW

HUGH B. GALLAGHER , III and JOANNE GALLAGHER, guardians of the estate of HUGH B. GALLAGHER, IV

Plaintiffs

vs.

TEMPLE UNIVERSITY HOSPITAL

Defendant

APRIL TERM, 2001
No. 2643

OPINION OF THE COURT

AUGUST 23rd, 2004
BONAVITACOLA, S.J.

INTRODUCTION

In May, 2000, Hugh B. Gallagher, IV, then age 19 (hereinafter, "Gallagher") was admitted to the burn intensive care unit ("BICU") at Temple University Hospital, after suffering severe, self-inflicted burns in an unsuccessful suicide attempt. The BICU contained seven beds, and on the evening of June 7, 2000, three nurses were on duty in the unit. Nurse Janet Lawson was assigned to be Gallagher's nurse, and Gallagher was the only patient for whom she was responsible that evening.

Because Gallagher was having trouble breathing independently, he had a tracheotomy in place, which

placed him at risk that a mucous or blood clot would block his airway. This required that he be suctioned at least once an hour, and was the most important reason that he had to be monitored.

At approximately 11:40 PM, Gallagher's airway became blocked, and he was unable to breathe. No one responded to his alarm for a period of between four and ten minutes, and by the time that Gallagher's condition was discovered, he was pasty white, had no heart rate, and was not breathing. Though he was resuscitated, there is no dispute that Gallagher suffered severe brain injury from loss of oxygen caused by the delay in responding to his alarm.

As a result, Gallagher (who had been a student at Penn at the time of his hospitalization) will never again live independently. He will likely never be able to hold a job, and will require the care of others for the rest of his life. He has difficulty walking and maintaining his equilibrium.

Gallagher's parents, his guardians, brought suit against Temple University Hospital for negligence. At trial, this Court allowed the Plaintiffs to amend their Complaint to add a claim for punitive damages (the facts giving rise to which will be discussed later in this opinion), and after an eight-day trial (from which the punitive damages claim was bifurcated), the jury returned a compensatory verdict of twenty million dollars.

The parties then presented additional evidence on the issue of the Defendant's net worth, after which the jury was charged on punitive damages. The jury again retired to deliberate, after which it returned an additional award of $15,000.00 in punitive damages.

The Defendant's post-trial motions were denied, and delay damages were awarded; the Plaintiffs then

praeciped for judgment, and the Defendant filed a Notice of Appeal.

DISCUSSION

A. The Jury Verdict Was Not Excessive and was Supported by Ample Evidence

Unquestionably, Temple University Hospital owed a duty of reasonable care to Hugh Gallagher on the evening of June 7, 2000.

It is beyond reasonable dispute that the care provided to Gallagher by Temple University Hospital on that evening fell below the applicable standard, and that this breach of the standard of care caused Gallagher to suffer severe brain damage from lack of oxygen.

The testimony established that:

- Gallagher required (and had) one-on-one nursing care on the night of June 7, 2000, because he was at risk for obstruction of his airway, and needed frequent suctioning;
- The BICU's records indicated that, at the time that Gallagher's alarm sounded, no life-threatening events were occurring with any of the other three patients in the unit, but that nonetheless, all three nurses assigned to the unit were in another patient's room, providing care of a non-emergent nature;
- The simultaneous presence of all three assigned nurses in a single room violated the hospital's own policies, and represented a deviation from the applicable standard of care;
- At the time of the incident, Gallagher was connected to monitors for heart rate, respiration, blood oxygen and blood pressure;
- The normal level of blood oxygenation is 99% or above, and Gallagher's monitoring

equipment was configured to sound an alarm if the blood oxygen level fell below 90%;

- At 11:41:19 PM, Gallagher's blood oxygen level was 28%, implying that it had fallen below 90% one to two minutes earlier[1] at which point his alarms would have begun to sound;
- At 11:41:19 PM, Gallagher's pulse rate was measured at 43; the monitor was configured to sounded an alarm when the rate dropped below 60;
- No one responded to Gallagher's alarms until 11:45 PM, five or six minutes after they had first sounded; at that point, he was pasty-white, was not breathing, and had no measurable pulse;
- The failure of the BICU nurses to respond to Gallagher's alarms for a period of five to six minutes represented a deviation from the applicable standard of care; and
- Lack of oxygen for a period of five to six minutes typically results in brain damage of the type sustained by Gallagher.

From these facts, the jury was amply entitled to find that the Defendant had negligently rendered care to Gallagher on the evening of June 7, 2000, that Gallagher had suffered severe hypoxia as a result, and that such negligence was a substantial factor in causing his brain damage. The law requires no more to support a negligence verdict.

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[1] Monitoring records for this earlier point in time were not produced by the Defendant, and were thus presumably destroyed. For this unexplained lapse, and for the spoliation of another document (discussed later in this opinion) the jury was given "adverse inference" instructions.

The Plaintiffs presented unrebutted evidence to establish that Gallagher's remaining life expectancy was 53.9 years, and that his future medical care over that period would cost $6,234,716.00.

The Plaintiffs' witness also testified—without contradiction—that because the cost of medical care has been increasing faster than the rate of inflation, it would require $12,933,159.00 in present-day dollars to purchase that care in the future.

The Plaintiffs also introduced evidence to establish that Gallagher's lost earning capacity over the remainder of his life fell between $3,228,413.00 and $13,854,761.00 (between $59,896.35 and $257,045.66 annually), and that his family had already incurred approximately $600,000.00 in medical bills.

The punitive damages award—$15,000.00, or just six one-thousandths of one percent of the defendant's net worth—is also reasonable, and appropriate to the facts adduced.

In light of these figures, the jury's verdict was well within reasonable limits, and was sufficiently supported by the record. The award does not shock the Court's conscience, and should not be disturbed.

B. The Punitive Damages Claim was Properly Handled

Section II(A) of the Defendants' post-trial is entitled, "Permitting punitive liability into this case, and trying that issue with compensatory liability and damages ... requir[es] judgment notwithstanding the verdict as to punitive damages and a new trial on liability."

The premise of this section heading is incorrect in several key respects. First, there is no requirement in Pennsylvania law that all claims in a single lawsuit arise from a single wrong.

In this case, over a period of approximately two and one-half years, the Plaintiffs' counsel conducted extensive pre-trial discovery. During that time—and in fact just days before trial began—the Plaintiffs' counsel had been falsely advised that he had received copies of all medical records relevant to the case, and that those records had not been altered in any respect.

In fact, the Defendant had repeatedly failed to advise the Plaintiffs' counsel that certain entries on Gallagher's critical care "flowsheet" for the evening of June 7, 2000 had been "whited out" and rewritten, that the original flowsheet had been removed from the file and replaced with a copy, and that the original flowsheet was stored in a safe located in the office of the Defendant's Risk Manager. The Defendant had falsely claimed, in response to numerous discovery requests, that the original flowsheet had been misplaced, and could not be located.

When the Plaintiffs' counsel learned for the first time—and contrary to earlier representations—that the Defendant indeed possessed the original flowsheet, he sought—and received—leave of Court to amend the Complaint to add a claim for punitive damages *stemming from the Defendant's apparently-deliberate failure to produce the original record, and the Defendant's repeated (and false) representations that it could not be located.*[2]

Though the Defendant argues that the Medical Care and Reduction of Error Act (40 P.S. § 1301, *et seq)*[3]

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[2] At trial, the parties stipulated that the missing documents had been withheld by the Defendant itself, and not by the Defendant's attorneys.

[3] Though the Mcare Act was not enacted until 2002, the language of the punitive damages statute previously in effect is identical for the purposes of this analysis.

precludes an award of punitive damages on these facts, the language of the statute indicates otherwise:

> "Punitive damages may be awarded for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the health care provider's act, the nature and extent of the harm to the patient that the health care provider caused or intended to cause and the wealth of the health care provider." (40 P.S. § 1301.812-A, repealed and replaced by 40 P.S. § 1301.505, *eff.* March 20, 2002).

The punitive damages claim in this case arises not from any aspect of the care rendered to Gallagher by the Defendant; rather, it arises from the hospital's post-injury actions, which a jury could reasonably find were part of a course of conduct intended to prevent the Plaintiffs from discovering the full extent of the Defendant's negligence on the evening of June 7, 2000, and thereby to reduce or eliminate the likelihood of an adverse jury verdict.

Such conduct falls well within the scope of the statutory provision quoted above, and that the Court properly allowed the requested amendment, and properly submitted the issue to the injury.

Second, punitive damages *were not* tried together with the compensatory claims.

There was no reasonable method by which the fact that white-out had been applied to the flowsheet could have been excluded from the evidence presented in support of the Plaintiff's claims for compensatory

damages[4]; the mere admission of this evidence in the compensatory portion of the case does not constitute trial of the punitive damages claim, and indeed, the Defendant does not argue otherwise.

Even though the document was ultimately produced, the use of "white-out" (a violation of the hospital's own policy) made it impossible to be certain what the original entries had said. Accordingly, the Court gave the jury an "adverse inference" charge, advising them that they could assume, for the purposes of their deliberations, that the unreadable entries would have contained information unfavorable to the defense.

That being so, the *only* evidence relevant to the punitive damages claim that was *irrelevant* to the compensatory damages claim was evidence of the Defendant's net worth, and—in recognition of the fact that wealth evidence can taint a compensatory award—no evidence on that point was given to the jury until *after* it had returned a verdict on the compensatory claims. In fact, though the Defendant contends that the punitive damages claim "tainted" the jury's deliberation on compensatory damages, the Defendant has not identified a single piece of evidence that it claims should have been excluded from the compensatory damages phase of the case on that basis.

On the initial verdict sheet, the jury was asked only a threshold question pertaining to punitive damages—was the conduct of Temple University Hospital [*after* the injury had occurred][5] willful or wanton or with reckless

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[4] The Plaintiff were completely entitled to explore the circumstances under which the record had been whited-out, to learn its original contents if possible, and to support their request for an "adverse inference" charge if not.

[5] Though the question on the verdict sheet did itself not contain the bracketed phrase; I specifically informed the jury,

indifference to the rights of Hugh Gallagher—and only after it returned a compensatory verdict and answered this question in the affirmative was evidence presented on the punitive damages claim itself.[6] Had the jury found that the Defendant had not been negligent, that such negligence had not been a substantial cause of Gallagher's injuries, or that Gallagher had suffered no compensable damages, this "threshold question" would never have been reached.

Under the circumstances, bifurcation of the punitive damages claim from the remainder of the trial in this particular manner was the most appropriate means of preserving the rights of both the Plaintiffs and the Defendant.

Because the premises set forth by the Defendant (that the punitive damages claim was improperly allowed into the case, and that the claim, once allowed, was improperly handled) are incorrect, the Defendant's conclusion—that post-trial relief is required—is logically (and factually) unsupported.

C. We Properly Refused to Question the Jury After the Verdict was Recorded

The jury returned its verdict on compensatory damages on a Friday afternoon. After the verdict was taken, the jury polled and the verdict recorded, I told the jurors that they would have to return on Monday to

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immediately before it retired to deliberate, that this question pertained only " ... to anything that may have occurred after the injury was sustained. Not before, after." (N.T., 10/24/03, at 41).

[6] The only additional evidence offered by the Plaintiffs in support of their punitive damages claim was the Defendant's net worth, which as read into the record by agreement. (N.T. 10/27/03, at 23).

consider an award of punitive damages. The jury foreperson then indicated concern, and when I asked the nature of the difficulty she said, "...I think the verdict that we came to, because we half on one and half on the other, the question—" but I interrupted her at that point, and released the jury until the following Monday morning. The defense immediately moved for a mistrial, which was denied.

"Jurors may not impeach their own verdict by testifying to what occurred during deliberations." *Boring v. LaMarca,* 435 Pa. Super. 487; 646 A.2nd 1199 (1994); *Carter by Carter v. U.S. Steel Corp.,* 529 Pa. 409; 604 A.2nd 1010 (1992). The only exception to this rule is when a claim is made that the jury was affected by "extraneous influences" which might have prejudiced their deliberations; in such cases, the court may inquire into the *existence* of the extraneous influences, but not as to the *effect* of such influences on the ultimate verdict. *Boring, supra.* In other words, jurors are not competent to testify as to what occurred during deliberations. *Carter, supra.*

> "In the course of a jury's deliberation, each juror weighs countless factors many of which he may not consciously be aware he is even considering. This is a rubric of life. Whenever a choice must be made, few men come to a decision on the basis of one factor alone, but only after weighing all the conflicting variables which inhere in the choice. '(B)eing personal to each juror, the working of the mind of any of them cannot be subjected to the test of other testimony, and therefore * * * such testimony should not be received to overthrow the verdict to which all assented.' *State [of NJ] v. Kociolek,* 20 N.J. 92; 118 A.2nd 812, at 816 (1955).

> "The logic of Mr. Justice William J. Brennan, Jr., (then a member of the New Jersey Supreme Court) in the *Kociolek* case is persuasive."
>
> *Commonwealth v. Zlatovich*, 440 Pa. 388; 269 A.2nd 469 (1970).

It is therefore of no concern whatsoever that the jury foreperson's comment might have been directed to the verdict that had just been recorded; even if she had finished her sentence, it would have provided no basis upon which a new trial properly have been granted.

The decision to deny the motion for mistrial was thus entirely correct.

D. The Jury Charge was Proper and the Plaintiffs' Summation was Appropriate

The Defendant's remaining allegations of error are directed to the Plaintiff's summation and to the jury charge; each will be discussed in turn.

1. The Plaintiff's Summation was Proper and No Mistrial was Warranted

During his summation, the Plaintiff's attorney made the following statement regarding the last-minute production of the supposedly-lost flowsheet, which elicited an immediate objection and a motion for mistrial from defense counsel:

> MR. SPECTER: "And this risk manager for the Temple Health System, whose risk is she managing? The patient's risk or the hospital's risk? What does she tell us? It's absolutely staggering. She tells us she that, oh yeah, I took the original record. It's the only one, took it from a foot-thick chart, took it to my office, Mr. Specter, Mr. Youman, for the original, never gave it to my lawyers. Mr. Fitzpatrick gets up and utters a stipulation that his office

> was told by her office that they couldn't find the original. They had the original. They had it. She said they had it. She said she knew they had it. He's going to tell you, well, we brought it into court.. Don't be too hard on us. Folks, use your life experience, what you know about the way the world works. You know most cases never ends *[sic]* up in court. They never go to a jury trial. What were they hoping? They were hoping this case would go away—"
>
> MR. FITZPATRICK: "Objection, your Honor."
>
> THE COURT: "Sustained."
>
> MR. FITZPATRICK: "I move for a mistrial."
>
> THE COURT: "Denied"
>
> (N.T., 10/23/03, at 43-44).

"Counsel usually has great latitude in his closing argument, [but] he may not present facts to the jury not in evidence, and that are prejudicial to the opposing part." *Millen v. Miller*, 224 Pa. Super. 569; 308 A.2nd 115 (1973).

Here, the evidence easily supports the inference that the Defendant withheld the original flowsheet in an effort to protect its own interests, believing that—by doing so—it would make the case easier (and likely less costly) to resolve. On this particular record, the defense objection presented a fairly close call, and might properly have been overruled. In context, the Court did not believe that the quoted statement was so patently prejudicial as to require that a mistrial be granted, and does not now believe that it warrants the award of a new trial.

2. The Sudden Emergency Doctrine Has No Application Here

The defense next complains that the Court should have charged on the "sudden emergency doctrine" as set

forth in *Lockhart v. List*, 542 Pa. 141; 665 A.2nd 1176 (1995) and that the failure of the Court to do so constitutes reversible error. The defense is incorrect.

The sudden emergency doctrine is a creature of motor vehicle cases. Where applicable, it appears to relax the duty owed by the operator of a motor vehicle who is "... confronted with a sudden and unexpected position of peril created in whole or in part by someone other than ..." the person asserting the doctrine. *Carpinet v. Mitchell*, 2004 Pa. Super. 197; 853 A.2nd 366 (May 27, 2004). In reality, the duty is not relaxed; the sudden emergency doctrine is merely an articulation of the fact that—in the face of an unexpected emergency—less may be required of a reasonable person than might otherwise be the case.

A hospital burn intensive care unit (indeed, a hospital generally) is a place where sudden emergencies happen regularly. Physicians and other health care providers are held to a standard of care that contemplates that such emergencies can and will occur, and that they will be responded to in a reasonably appropriate manner.

The sudden emergency doctrine simply has no application to a medical malpractice case, as its effect would be to improperly diminish the duty of care owed to a plaintiff by reason of an event for which the health care provider should have been fully prepared; indeed, there is no reported Pennsylvania malpractice case in which this doctrine was applied.

The decision to refuse to charge on this doctrine was thus entirely correct.

3. No Charge on Vicarious Liability was Necessary

Awards of punitive damages in medical malpractice cases based upon vicarious liability are restricted by 40 P.S. § 1303.505(c)[7] which reads as follows:

> "(c) Vicarious liability—Punitive damages shall not be awarded against a health care provider who is only vicariously liable for the actions of its agent that caused the injury unless it can be shown by a preponderance of the evidence that the party knew of and allowed the conduct by its agent that resulted in the award of punitive damages."

Here, the original flowsheet was admittedly removed from Gallagher's file by the Defendant's director of risk management, who replaced it with an altered copy and held the original in a sealed envelope in her office safe. When a high-level official of a corporate defendant takes such an obviously inappropriate action, it is proper—particularly in the absence of evidence to the contrary—to assume that she did so with at least the tacit approval of, and possibly even at the direction of, senior management.

On the facts of this case—which are probably as damning as such facts come—no further proof of the hospital's culpability was necessary, and no error was committed by not requiring it.

CONCLUSION

For the reasons detailed above, no error occurred during this case to warrant post-trial relief. Accordingly,

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[7] Here, because the withholding of the document continued from the time that it was first requested until the very first day of trial, it is unclear whether the current statute, 40 P.S. § 1303.505(c), or the prior statute, 40 P.S. § 1301.812-A(c) applies; fortunately, for the purposes of this analysis, the statutes are identical.

my decision to deny that relief should be affirmed, and the jury's verdict upheld.

BY THE COURT:

Bonavitacola, S.J.